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ONE HUNDRED SIXTH CONGRESS

# Congress of the United States

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December 1, 1999

### VIA FACSIMILE

The Honorable Carol M. Browner  
Administrator  
Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

Dear Administrator Browner:

I am writing to comment on the Environmental Protection Agency's (EPA) notice of proposed rulemaking (NPRM) issued October 29, 1999, and entitled "Control of Emissions of Air Pollution From 2004 and Later Model Year Heavy-Duty Highway Engines and Vehicles; Revision of Light-Duty Truck Definition" (64 FR 58471). My comments are as follows.

1. The NPRM is premature in light of the recent *American Trucking* decision.

In *American Trucking Ass'ns, Inc., v. Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir. 1999), a United States Court of Appeals held that EPA's construction of sections 108 and 109 of the Clean Air Act (CAA) rendered them an unconstitutional delegation of legislative power. As a result, the Court remanded the national ambient air quality standards (NAAQS) for ozone and particulate matter that EPA had promulgated in 1997. In addition, the Court held that EPA must consider the health benefits of a pollutant, as well as its negative effects, when setting or revising NAAQS.

Although EPA appealed this decision on June 28, 1999, the final outcome is far from decided. NAAQS lie at the heart of the CAA and play an integral role in determining appropriate emission standards. EPA should not finalize any rule that adds to or amends those standards until *American Trucking* is resolved and appropriate NAAQS have been established.

Additionally, EPA cannot argue (as it attempts to do at 64 FR 58476) for reduced oxides of nitrogen (NOx) emissions under the premise that States find it difficult to comply with the new ozone NAAQS. The *American Trucking* case remanded the ozone

standards to EPA for review—a review that must acknowledge and reflect the *benefits* of pollutants. Until the NAAQS are finalized, there is no appropriate standard by which to measure compliance. Therefore, at this point, EPA cannot say affirmatively whether States find it difficult to comply with the new NAAQS.

2. EPA is rushing through the rulemaking process.

As I stated in my letter to you dated October 8, 1999, I am concerned about the process EPA is following for this major (significant) rulemaking. EPA held only one public hearing on November 2, 1999—just two working days after the NPRM was published in the *Federal Register*. EPA also allowed a public comment period of only 30 days, the absolute minimum required by CAA § 307(h).

EPA stated in the NPRM that it is attempting to issue the final rule by the end of this year—a mere 19 working days after the December 2nd comment deadline (64 FR 58475). The stated reason for the rush is that CAA § 202(a)(3)(C) requires 4 years' lead time before new standards can take effect. Therefore, the rule must be finalized before January 1, 2000, if the proposed standards are to be imposed on the 2004 model year. There is also a rush because the 1995 Statement of Principles (agreed to by EPA, the California Air Resources Board, and certain representatives of the heavy-duty engine industry) and the resulting 1997 final rule (62 FR 54694) both require a technical review of the proposed 2004 emission standards to be completed by the end of 1999.

Executive Order 12866 (signed September 30, 1993) requires agencies to “provide the public with meaningful participation in the regulatory process” and with “a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of *not less than 60 days*” (§ 6(a), emphasis added). In fact, in 1978, President Carter established 60 days as the minimum length of comment periods for all significant rules (Executive Order 12044). EPA did not comply with this 21-year-old minimum when it limited the NPRM's comment period to 30 days. And for a rule of this magnitude and complexity, one hearing and 30 days to comment are inadequate to give the public and the regulated community an effective opportunity to participate in the regulatory process.

Furthermore, the NPRM includes provisions of a 1998 consent decree entered into by EPA, the Department of Justice, and six heavy-duty diesel engine manufacturers—provisions that are not in the Statement of Principles or the 1997 final rule. By changing the technical parameters of the anticipated NPRM, EPA has affected the industry's ability to comply with the proposed requirements. For example, the new provisions change the feasibility of attaining the revised emission standards and the feasibility of increasing the useful life of engines. Particularly in light of those significant issues, 30 days is simply insufficient time in which to provide useful comments.

This NPRM was anticipated in early 1999. In EPA's own semi-annual regulatory calendar, published April 26, 1999, EPA indicated that the NPRM would be released in April 1999 (64 FR 21927). EPA has had 4½ years to coordinate this NPRM in a timely,

un-rushed manner. Whatever the reason for the delay, the public should not be penalized for EPA's failure to publish the NPRM until late 1999. EPA should extend the public comment period to at least 60 days (preferably 90 days), to afford the public sufficient time to comment and to avoid rushing through the process of finalizing a major rule. In addition, EPA should not apply the emission standards in the NPRM to any model year prior to 2005.

Yesterday, November 30, 1999, the comment period was extended to December 16, 1999, for all aspects of the NPRM except for the provision regarding the definition of light-duty trucks. The extension was made just two days before the December 2nd deadline, and it is questionable that all interested parties will be notified of the extension in time to make use of the additional two weeks. Even assuming all interested parties are timely notified, however, the comment period is still too short. Forty-four days is insufficient time in which to meaningfully comment on such a complex rule. Ideally, EPA should further extend the comment period to January 31, 2000.

3. EPA may not be in compliance with the requirements of the Clean Air Act.

I addressed this issue in my letter of August 5, 1999, in which I commented on EPA's NPRM regarding the Tier 2 tailpipe emission standards and the sulfur content in gasoline (64 FR 26004). The same principles apply to this proposed rule. CAA § 202(i)(2)(A) states that EPA must determine whether reducing vehicle emissions is necessary in order to "attain or maintain" the NAAQS. However, reducing NOx emissions may not necessarily lower ozone levels. It has long been known that reducing emissions of NOx precursors—a constituent of smog—can, paradoxically, lead to *higher* levels of smog. EPA's air quality analysis study, required under CAA § 202(i)(3)(A), shows that several urban areas will experience higher ozone levels in 2010.

The study in question, which was conducted by Abt Associates, plainly shows that reducing NOx emissions will lead to higher levels of ozone smog.<sup>1</sup> Specifically, the analysis shows that seasonal ozone levels may increase by as much as 8.7 parts per million in some urban areas. Apparently disregarding the findings in the Abt study, EPA states in the NPRM that it "believes that the expected *increase* in NOx will likely result in an increase in ozone problems in the future" (64 FR 58476, emphasis added). EPA should provide further analysis of the NOx "disbenefits" issue before finalizing its rule and further reducing NOx emissions from mobile sources.

4. Other sources of NOx and VOC emissions should be considered when setting standards to attain NAAQS.

By EPA's own estimate, non-road engines and vehicles, combined with stationary point and area sources, will account for 70 percent of all NOx and 73 percent of all volatile organic compound (VOC) emissions in the year 2000 (Table 1 at 64 FR 58477). Light-duty vehicles are estimated to account for 19 percent of national NOx and 25

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<sup>1</sup> Abt Associates, "Tier II Proposed Rule: Air Quality Estimation, Selected Health and Welfare Benefits Methods, and Benefit Analysis Results," April 1999, Exhibit A-21.

percent of national VOC emissions in 2000. Heavy-duty vehicles will account for only 11 percent of national NOx emissions and a mere two percent of national VOC emissions in 2000.<sup>2</sup>

Despite the fact that on-road engines and vehicles account for one-quarter or less of all NOx and VOC emissions, EPA continues to impose more and more stringent emission standards on those sources. It is inequitable to lower emission standards for on-road sources when non-road and stationary sources account for the vast majority of all NOx and VOC emissions. On-road sources should not be held disproportionately responsible for NAAQS attainment. Instead, EPA's emission standards should reflect the corresponding responsibility of the major offenders.

5. By attempting to redefine "light-duty" vehicles, EPA has acted inequitably and may be acting outside its statutory authority.

In CAA § 202(b)(3)(C), Congress defined heavy-duty vehicles as those with a gross vehicle weight "in excess of six thousand pounds." In the 1977 amendments to the CAA, Congress recognized that some trucks weighing more than 6,000 pounds were being called light-duty vehicles and, in fact, referred to such vehicles in CAA § 202(h).

The Conference Report for the 1977 CAA amendments authorized EPA to subdivide heavy-duty vehicles into classes or categories (Conference Report 95-564). The report also states that "the recent classification of vehicles between 6,000 and 8,500 pounds as light duty trucks would continue to be appropriate" (p. 544). It is unclear that this statement also authorizes EPA to redefine light-duty trucks as vehicles with a gross vehicle weight rating up to 10,000 pounds—nearly twice the statutory limit.

There is also a question of equity with regard to redefining light-duty vehicles. EPA issued its NPRM regarding the Tier 2 tailpipe emission standards on May 13, 1999. In describing the Tier 2 standards, EPA stated that "[t]he light duty category of motor vehicles includes all vehicles and trucks *under 8500 pounds* gross vehicle weight rating, or GVWR (i.e., vehicle weight plus rated cargo capacity)" (64 FR at 26031, emphasis added).

This NPRM proposes, before the Tier 2 rule is even finalized, to redefine light-duty trucks as any vehicle that weighs between 8,500 and 10,000 pounds GVWR, is designed primarily for transporting people, and has a capacity of up to 12 persons (64 FR 58503). By so doing, EPA expanded the reach of the proposed Tier 2 standards, without expanding the opportunity for comment by manufacturers of the affected vehicles. Manufacturers were led to believe that such vehicles would not be subject to the new Tier 2 standards. Had it been clear that a proposal for a revised definition would retroactively subject those vehicles to the Tier 2 standards, manufacturers would have had different

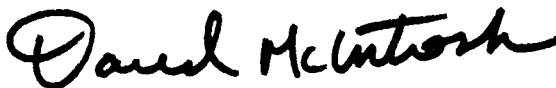
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<sup>2</sup> EPA notes that this estimate does not include emission impacts associated with the heavy-duty diesel engines at issue in the 1998 consent decree. EPA also states that, if the emissions from those engines were included, the estimate regarding heavy-duty diesel vehicles would be "significantly increased." However, since EPA does not define "significant," the magnitude of the stated increase is unknown.

and, perhaps, additional comments on the Tier 2 rule. Furthermore, EPA has provided no analysis of the costs or benefits of the Tier 2 rule, as it would apply to passenger vehicles between 8,500 and 10,000 pounds GVWR.

In sum, the NPRM is premature, rushed, inequitable, and possibly unauthorized. If you have any questions about these comments, please contact Heather Henderson, Subcommittee Counsel, at (202) 225-4407.

Sincerely,

A handwritten signature in black ink that reads "David McIntosh". The signature is written in a cursive, flowing style.

David M. McIntosh  
Chairman  
Subcommittee on National Economic Growth,  
Natural Resources and Regulatory Affairs

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich